

1 negotiation on the same terms and conditions as those contracts
2 that do comply with Section 628.

3
4 **3. Exclusive Contracts**

5 The Notice requests comments on several issues relating
6 to exclusive contracts. See Paragraph 28 of the Notice.

7 First, WJB believes that the term "exclusive contract"
8 should be defined broadly. WJB believes that if an affiliated
9 vendor and an unaffiliated vendor are each offered contracts, but
10 the unaffiliated version contains significant restrictions not
11 found in the affiliated version, the affiliated vendor, in effect,
12 has an exclusive contract. Thus, an exclusive contract can exist,
13 even if the same services are offered to other parties.

14 The Notice also asks what showing should be required to
15 establish that an exclusive contract has been entered into. See
16 Paragraph 33 of the Notice. Again, an unaffiliated vendor will
17 probably not have access to the documentary evidence needed to
18 conclusively establish the existence of an exclusive contract.
19 Thus, the required showing should be minimal, with the burden of
20 disproving a violation placed on the vendor, who is the only party
21 privy to the relevant information.

22 WJB disagrees with the preliminary conclusion reached in
23 the Notice that a showing of harm is required to establish a
24 violation under Section 628. See Paragraph 34 to the Notice.
25 Again, Section 628(b) requires only a showing of an "unfair method
26 of competition" or an "unfair or deceptive act or practice" which

1 has the "purpose" or the "effect" of hindering a programmer. Thus,
2 if the intent or motivation (the "purpose") is to hinder a

1 or favors the cable company in a particular market and, for that
2 reason, discriminates against the MMDS operator in that market.
3 This conduct should be prohibited, regardless of how the vendor
4 treats other MMDS operators. Thus, establishing a presumption
5 based on penetration levels may be unwise.

6 7 **III. PROGRAM CARRIAGE AGREEMENT ISSUES**

8 The Notice also solicits comments regarding Section 12 of
9 the 1992 Cable Act. This provision adds a new Section 616 to the
10 Communications Act of 1934, which addresses regulation of carriage
11 agreements between programmers and vendors. It is especially
12 designed to restrict certain activities of programmers with respect
13 to vendors.


14 The Notice asks for comment as to whether Section 616,
15 when read in conjunction with Section 628, prohibits exclusive
16 contracts. The Notice points out that Section 628(c) only refers
17 to exclusive contracts in the case of affiliated programmers and
18 vendors. However, as WJB has previously noted, Section 628(c)
19 should not be read as limiting the scope of Section 628; this
20 subsection only identifies specific and "minimum" conduct for which
21 regulations are to be promulgated. Instead, WJB believes that a
22 fair reading of Section 628(b) prohibits all practices that
23 constitute "unfair methods of competition" or are "unfair or
24 deceptive" and have the purpose of hindering the activities of a
25 programmer.

1 Section 616(a)(3) prohibits a programmer from unduly
2 influencing the decisions of unaffiliated vendors. The Notice asks
3 for comment on this provision. See Paragraph 57 of the Notice.
4 Again, it is important to recognize that the cable industry is
5 dominated by a few large companies who own a large percentage of
6 the systems nationwide . These companies have acquired the market
7 power, through their size and monopoly status, to dictate the terms
8 of carriage agreements. Clearly, they can influence the decisions
9 of unaffiliated vendors.

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12 **RESPECTFULLY SUBMITTED** this 25th day of January, 1993.

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15 **WJB-TV Limited Partnership**

16 BY:


Kenneth E. Hall
General Manager

18 8423 S. US #1
19 Port St. Lucie, FL 34985
20 (407) 871-1688
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22
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